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GOVERNMENT OF MALAYSIA v. POH MAH HOUSING DEVELOPMENT SDN BHD; AFFIN BANK BHD, KOH HUAT KWAN & SYMPHONY PARADIGM SDN BHD (APPLICANTS)

HIGH COURT MALAYA, IPOH
LEE SWEE SENG J
B [COMPANIES WINDING UP NO: 28-38-1998]
28 NOVEMBER 2014

COMPANY LAW: *Winding-up – Liquidators – Sale of property – Consent order entered between bank and liquidator to execute memorandum of transfer –*
C *Contributory's application to set aside consent order – Whether fresh action ought to be filed – Bank lodged lien-holder's caveat on land – Whether bank proceeded with order for sale – Whether limitation of time applied in sale by liquidator – Whether sale ought to be set aside since land could have been sold at higher price – Whether decision of liquidator appealable – Whether court's interference*
D *warranted – Companies Act 1965, ss. 180(3), 236(2)(c), 236(3) & 279*

LAND LAW: *Sale of land – Sale by liquidator – Consent order entered between bank and liquidator to execute memorandum of transfer – Contributory's application to set aside consent order – Whether fresh action ought to be filed – Whether limitation of time applied in sale by liquidator – Whether sale ought to be set aside*
E *since land could have been sold at higher price – Whether decision of liquidator appealable – Whether court's interference warranted – Companies Act 1965, ss. 180(3), 236(2)(c), 236(3) & 279*

LAND LAW: *Lien – Lien holder's caveat – Bank obtained judgment against wound-up company – Failure to settle outstanding debt – Whether judgment debt*
F *secured by entry of lien holder's caveat – Whether lien holder's caveat lodged after judgment obtained against company – Sale of land by liquidator – Consent order entered between bank and liquidator to execute memorandum of transfer – Contributory's application to set aside consent order – Whether bank proceeded with*
G *order for sale – Whether limitation of time had set in – Whether all sums due under lien fully paid – Companies Act 1965, ss. 180(3), 236(2)(c), 236(3) & 279*

LIMITATION: *Land - Order for sale – Lien holder's caveat – Bank obtained judgment against wound-up company – Whether lien-holder's caveat lodged after judgment obtained against company – Whether bank proceeded with order for sale*
H *– Whether limitation of time had set in – Whether limitation of time applied in sale by liquidator – Limitation Act 1953, s. 21(1) & (2)*

WORDS & PHRASES: *"court" – Meaning of – Companies Act 1965, ss. 263(3) & s. 279 – Whether refers to winding-up court*

WORDS & PHRASES: *"pleading" – Meaning of – Rules of Court 2012, O. 1*
I *r. 4 - Whether includes notice of application or preliminary act*

The respondent ('the company') took a financing facility from Affin Bank Berhad's ('the bank') predecessor-in-title. The said facility was secured over a piece of land ('the land') and the title was deposited with the bank. On

3 July 1995, the bank lodged a lien holder's caveat after judgment had been entered on 6 December 1989 against the company and four others for the sum of RM1,575,984.41. However, on 26 May 1999, the company was wound up by the Government of Malaysia for unpaid income tax to the Inland Revenue Department. On 26 June 2013, pursuant to a summons-in-chambers filed by the bank, a consent order was entered into between the bank and the official receiver ('OR') as liquidator wherein it was agreed that the OR would execute the relevant Form 14A under the National Land Code ('NLC') to transfer the land to a prospective buyer. The land was valued at RM1 million and it was sold to Symphony Paradigm Sdn Bhd ('Symphony') for RM1.2 million. In the circumstances, the OR duly executed the Form 14A to effect the transfer to the said purchaser. Since the full purchase price of RM1.2 million had been paid, Symphony was the beneficial owner of the land. However, *vide* encl. 8, one Koh Huat Kwan ('Koh'), a contributory of the company, had applied by way of summons-in-chambers to intervene in the proceeding to set aside the order of the court dated 26 June 2013. The said application was made under ss. 236(3) and 279 of the Companies Act 1965 ('CA 1965'). Koh's prayer for a stay of the court order until disposal of the application was allowed by the court, subject to certain conditions. As such, the registration of the land could not be completed due to the temporary stay of the court order dated 26 June 2013. On the other hand, Symphony had also applied to intervene in the proceedings under s. 226(3) of the CA 1965. The issues that arose for consideration, *inter alia*, were (i) whether Koh should have filed a fresh action to set aside the consent order recorded between the bank and the OR as liquidator; (ii) whether the lien-holder's caveat may be lodged after judgment had been taken on the loan; (iii) whether Koh could raise the defence of limitation in that the lien-holder's caveat was entered in 1995 after judgment on the loan had been entered in 1989 and the bank had not proceeded with an order for sale; (iv) whether limitation would run in a sale by the liquidator when the company was wound up in 1999; and (v) whether the sale of the land by the liquidator ought to be set aside on the ground that Koh could find an interested purchaser who was willing to purchase the land at a higher price. It was, however, contended that the issue of limitation was never raised in Koh's affidavit.

Held (dismissing encl. 8 with costs):

(1) The application was made under s. 236(3) and s. 279 of the CA 1965. The reference to the 'court' in these sections would mean the winding-up court and any application arising out of any matter in the course of a winding-up should be referred to the winding-up court. Further, it would be pointless to start a fresh proceeding as the challenge was against the decision of the liquidator in agreeing to sign the relevant memorandum of transfer with respect to a sale by the liquidator. Since

A all the parties that may be affected by the setting aside of the consent order were before the court, no one could complain of any injustice suffered as a result of the procedure followed. (paras 17-20 & 24)

(2) The position of the bank seemed to be that of an equitable mortgagee having custody of the title as security for the loan. The lien-holder's B caveat was still on the land to secure the judgment sum. There was no frontal attack on it by way of removing it or declaring it as null and void. If the Registrar were to remove the lien-holder's caveat, he must be satisfied that all sums due under the lien had been fully paid. There was no evidence from Koh that the judgment sum had been paid; all evidence C point to the fact that the judgment sum was still outstanding. Koh, by contending in writing to the bank that the land should have been sold for RM1.4 million and not for RM1.2 million, had made an admission that there was an outstanding debt which had not been satisfied. The only complaint was the proposed price at which the land was sold. D (paras 26, 30, 34 & 35)

(3) The lien-holder's caveat may be entered later and the bank would not lose its priority unless by its conduct it was estopped from asserting its priority. The judgment debt had been secured by way of the entry of the lien-holder's caveat and a deposit of the title with the bank. That E security remained intact and upon payment of the judgment debt, the security in the title would be returned to the company and the caveat removed by the bank. Further, s. 180(3) of the CA 1965 stipulates as to what instruments would require registration with the Registrar of Companies. Therefore, reliance on *Ngan Khong v. Bamah Pakeh Jamin* F *Rasid Luha* that a lien was analogous to an equitable mortgage as authority for the need to comply with registration of the lien with the Registrar of Companies was misplaced. (paras 26, 37 & 42)

(4) The bank entered a lien-holder's caveat against the land in 1995. The bank did not proceed to obtain or apply for an order for sale. In cases G of a charge action for recovery, time starts to run from the date of demand for repayment is made, *ie*, from the time either Form 16D or Form 16E is served on the borrower. However, for a lien-holder's caveat, there was no requirement for a notice in Form 16D or Form 16E to be sent. In the case of an application for an order for sale of a land H secured under the lien-holder's caveat, the entitlement to an application for an order for sale runs from the date judgment was entered for the loan taken. (paras 43, 49 & 51)

(5) In *Tham Kok Onn v. Perwira Habib Bank Malaysia Bhd*, s. 4 of the Limitation Act 1953 did not apply to a summons action because by I definition, pleadings do not include a petition, summons or preliminary act. Further, the requirement to plead statute of limitation as a defence

is contained in O. 18 r. 8 of the Rules of the High Court 1980 which relates to writ action and not to a summons. Under O. 1 r. 4 of the Rules of Court 2012, "pleading" does not include a notice of application or a preliminary act. The present case was not an application for an order for sale by the bank. If the bank had proceeded with an order for sale, perhaps Koh may then raise the fact that as limitation had set in, that would be "cause to the contrary" under s. 256(3) of the NLC. The plea of limitation, however, was not relevant as against the liquidator. (paras 53 & 54)

(6) The company was in liquidation and all its assets were vested in the liquidator. The directors had no power to deal with it as they were *functus officio*. The sale of the land was by the liquidator and time did not run against the liquidator in relation to the disposal of the assets of the company in liquidation. However, assuming that the defence of limitation was properly raised, the bank would be an unsecured creditor if an order for sale could not be applied for or proceeded with. The judgment obtained on 6 December 1989 would still be recoverable as the bank had 12 years, *ie*, until 5 December 2001, to apply for an order for sale. Before that time was up, the company went into liquidation in 1999. Time would stop running against the bank as a creditor. Section 21(1) and (2) of the Limitation Act 1953 deals with the period of limitation actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land. (paras 55-57 & 65)

(7) The powers of the liquidator to sell immovable assets of a company under liquidation is provided under s. 236(2)(c) of the CA 1965. On the facts, the liquidator merely exercised its power of sale of the land irrespective of whether there was a lien-holder's caveat or otherwise over the land. It was part of the liquidator's duty to realise the proceeds of sale to pay its creditors including the Inland Revenue Department at whose instance the company was wound up. In relation to whether the liquidator should decide to distribute the proceeds of the sale to the bank in priority as a secured creditor or that the bank was an unsecured creditor for its failure to proceed with an order for sale within the 12 years period, was a decision of the liquidator that would be appealable to this court. As such, Koh could even take the position that the bank had ceased to be a creditor as the debt secured was now unrecoverable due to the fact that limitation had set in. However, there was no reason for anyone to stop the liquidator's sale. (paras 66, 68 & 69)

(8) The courts had been consistent in not interfering with the decision of the liquidator to dispose of assets of a company in liquidation. However, there will be interference if it could be shown that (i) the liquidator had acted fraudulently; or (ii) the liquidator had not exercised his discretion *bona fide*; or (iii) the liquidator had done and/or proposed to do

A something which was so utterly unreasonable and absurd that no reasonable man would do it. On the facts, the liquidator did nothing unusual in the discharge of its duties to wrap up the liquidation. As such, there was no reason to set aside the decision of the OR as liquidator to sell the land. (paras 76, 80 & 81)

B **(9)** As the offer to purchase had come from Koh's buyer at RM1.4 million after the bank had accepted the offer from Symphony at RM1.2 million, neither the bank nor the liquidator could be faulted for proceeding with the sale at RM1.2 million. The earnest deposit had been paid for the purchase at RM1.2 million whereas there was nothing in writing let C alone the payment of an earnest deposit from the so-called purchaser that Koh knew of. However, if at all the liquidator and the bank had been negligent in selling the land at RM1.2 million, Koh could then bring the relevant action for damages for negligence and not to set aside the sale by the liquidator. (paras 86 & 89)

D **Case(s) referred to:**

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor [2007] 7 CLJ 516 HC ***(refd)***

American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd [2012] 1 CLJ 506 CA ***(refd)***

Dr KS Thangal v. State of Kerala [1968] AIR 197 Kerala ***(refd)***

E *Harold M Pitman & Co v. Top Business Systems (Nottingham) Ltd [1984] BCLC 593* ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Khaw Poh Chhuan v. Ng Gaik Peng (F) & Yap Wan Chuan & 9 Ors [1996] 2 CLJ 185 SC ***(refd)***

F *Leon v. York-O-Matic Ltd [1966] All ER 277* ***(refd)***

Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh [1969] 1 LNS 106 HC ***(refd)***

Ngan Khong v. Bamah Pakeh Jamin Rasid Luha [1935] 1 LNS 42 HC ***(refd)***

Paramoo v. Zeno Ltd [1968] 1 LNS 95 FC ***(refd)***

Perwira Affin Bank Bhd v. Lim Weow [1998] 4 CLJ 17 CA ***(refd)***

G *Perwira Affin Bank Bhd v. Selangor Properties Sdn Bhd & Ors [2010] 3 CLJ 45 CA* ***(refd)***

Re Cases of Taff Wells Ltd [1992] BCLC 11 ***(refd)***

Re General Rolling Stock Co Ltd, Joint Stock Discount Co's Claim [1872] 7 Ch App 646 ***(refd)***

Taj Clay Works Ltd v. Official Liquidator [1960] AIR 429 ***(refd)***

Tan See Siong & Anor v. Herman Ando [2011] 2 CLJ 16 FC ***(refd)***

H *Tham Kok Onn v. Perwira Habib Bank Malaysia Bhd [2004] 4 CLJ 818 CA* ***(refd)***

Tio Chee Hing v. Tractors Malaysia Bhd [1972] 1 LNS 157 FC ***(refd)***

Tong Lee Hwa v. Chin Ah Kwi and Tong Chong Fah v. Chin Ah Kwi [1971] 1 LNS 143 FC ***(refd)***

Univein Sdn Bhd v. Malaysia Building Society Bhd [2003] 2 CLJ 514 CA ***(refd)***

Watta Battery Industries Sdn Bhd v. Uni-Batt Manufacturing Sdn Bhd And Chow Siew I *Hon & Ors (Interveners) [1993] 1 CLJ 555 HC* ***(refd)***

Wilding v. Sanderson [1897] 2 Ch 534 ***(refd)***

Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 108(1), (2), (3), 226(3), 236(2)(c), (3), 279
Companies Ordinance, s. 80
Companies (Winding-up) Rules 1972, r. 194
Limitation Act 1953, ss. 4, 21(1)
National Land Code, ss. 254, 255, 256(3), 257, 258, 259, 266, 267, 268, 279, 281(1), (2), (3), 331
Rules of the High Court 1980, O. 1 r. 4, O. 14 , O. 18 r. 8

Bankruptcy Act 1914 [UK], s. 80
Companies Act 1948 [UK], ss. 245(3), 246(5)
Limitation Act 1980 [UK], ss. 20(1), (2)

Other source(s) referred to:
Halsbury's Laws of England, vol 28 (4th edn, Reissue), p 352

For the Official Receiver (Liquidator) - Latip Mohammad (Siti Mafuza & Azny Adila with him); FCs
For the Applicant (Bank) - SP Muthu Veloo; M/s SP Veloo & Co
For the Applicant (Contributory) - Raj Shankar; M/s Raj Shankar
For the Applicant (Purchaser) - Rathimalar; M/s Rathi MG Assocs

Reported by Kumitha Abd Majid

JUDGMENT

Lee Swee Seng J:

[1] The respondent company had taken a financing facility from the applicant's predecessor-in-title Asia Commercial Finance (M) Berhad. The applicant is Affin Bank Berhad ("the Bank"). The said facility was secured over a piece of land held under GM 5A, Lot No. 2859, Mukim Durian Sebatang, District Teluk Intan, State of Perak ("the land"). Title to the said land was deposited with the Bank. However the lien-holder's caveat was only lodged on 3 July 1995 after judgment had been taken on 6 December 1989 against the respondent company and four others pursuant to an O. 14 application under the then Rules of the High Court 1980 ("RHC"). The judgment was for the sum of RM1,575,984.41 together with interest at the rate of 8% per annum until the date of satisfaction and costs.

[2] The respondent company was wound up by the Government of Malaysia on 26 May 1999 for unpaid income tax to the Inland Revenue Department.

Problem

[3] The Bank had applied by way of encl. 1A for the OR as Liquidator to be substituted with another Liquidator on ground that though the respondent company had been wound up on 26 May 1999, the land in question has not been sold and that the Bank as applicant intends to dispose of the land to realise its security.

[4] On the date of the hearing of the application, the OR intimated that it had no objection to the execution of the relevant Form 14A under the National Land Code ("NLC") in favour of a purchaser of the land who might be interested to purchase the land. The application was then amended to include an alternative prayer that the OR do execute the relevant Form 14A under the NLC to transfer the land to a prospective buyer.

[5] On 26 June 2013, a consent order was entered into between the applicant bank and the OR as Liquidator wherein it was agreed that the OR do execute the said Form 14A under the NLC in favour of a purchaser to be identified and that the purchase price must not be less that the current valuation in a valuation report to be prepared. The Jabatan Penilaian dan Perkhidmatan Harta had valued the said land at RM1 million. The said land was sold to Symphony Paradigm Sdn Bhd ("Symphony") for RM1.2 million and the OR duly executed the Form 14A under the NLC to effect the transfer to the said purchaser.

Prayers

[6] By encl. 8 the applicant Koh Huat Kwan ("Koh"), a contributory of the respondent company, had applied to intervene in the proceeding to set aside the order of the court dated 26 June 2013 obtained by the Bank and consented to by the OR as Liquidator. According to Mr Raj Shankar, learned counsel for Koh, the application is made under ss. 236(3) and 279 of the Companies Act 1965.

[7] There was also a prayer for a stay of the said order until the disposal of the above application. The stay was granted on condition that a sum of RM50,000 being security for damages and costs be deposited with the Bank's solicitors Messrs SP Veloo & Co by 9 June 2014 which was duly complied with by Koh.

[8] Meanwhile the said purchaser Symphony had also applied on 16 June 2014 in encl. 16 to intervene in the proceeding under s. 226(3) Companies Act 1965. As the said purchaser has paid the full purchase price of RM1.2 million they are beneficial owner of the land and so they applied to continue with the process of registration of the land in its name at the Land Office, which transfer has been presented for registration but could not be registered because of a temporary stay of the order of court dated 26 June 2013.

Principles

Whether The Contributory Koh Should Have Filed A Fresh Action To Set Aside The Consent Order Of Court Recorded Between The Bank And The OR As Liquidator

[9] The Contributory Koh had applied by way of a summons-in-chambers to set aside the consent order of 26 June 2013, entered into between the applicant bank and the OR as Liquidator wherein it was agreed that the OR

do execute the said Form 14A under the NLC in favour of a purchaser to be identified and that the purchase price must not be less that the current valuation in a valuation report to be prepared. The said consent order was recorded pursuant to a summons-in-chambers files by the applicant bank.

[10] Learned counsel for the Bank, Mr SP Veloo, argued that the proper procedure to set aside the consent order was by way of a fresh proceeding constituted for that purpose. He submitted a substantial array of authorities highlighted below.

[11] In *Wilding v. Sanderson* [1897] 2 Ch 534 at pp. 543 to 544, the English Court of Appeal said:

> ... A consent judgment or order is meant to be the formal result and expression of an agreement already arrived at between the parties to proceedings embodied in an order of the Court. The fact of its being so expressed puts the parties in a different position from the position of those who have simply entered into an ordinary agreement. It is, of course, enforceable while it stands, and a party affected by it cannot, if he conceives he is entitled to relief from its operation, simply wait until it is sought to be enforced against him, and then raise by way of defence the matters in respect of which he desires to be relieved. He must, when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose.

[12] Likewise in *Tong Lee Hwa v. Chin Ah Kwi and Tong Chong Fah v. Chin Ah Kwi* [1971] 1 LNS 143; [1971] 2 MLJ 75 a settlement was recorded between parties by consent which required one of the parties to do a certain act within the time frame stipulated in the said order, and the party in question who failed to complete the act in question within the stipulated time, applied to the courts for an extension of time, and the application was granted. On appeal the issue that fell to be considered was whether the court had the jurisdiction to vary its own order. The Federal Court (Gill FJ, as His Lordship then was) at pp. 79-80 said:

> The general rule is that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (a) there has been a clerical mistake or an error arising from an accidental slip or omission, or (b) the judgment as drawn up does not correctly state what the court actually decided and intended to decide, in either of which cases the application may be made by motion in the action (see *Ainsworth v. Wilding* [1896] 1 Ch 673). The same rule must apply, *a fortiori*, where the parties have entered into an agreement in pursuance of the terms of settlement embodied in the consent order.

[13] Further in *Tan See Siong & Anor v. Herman Ando* [2011] 2 CLJ 16; [2011] 3 MLJ 429 – a similar question, ie, whether a judge can vary his own order fell to be considered again by the Federal Court. At p. 436, James Foong FCJ held:

A It is a well established law that a judge is *functus officio* once he has delivered his judgment. A party who is dissatisfied with this judgment can appeal against it. The said judge cannot vary his own judgment except under the 'slip rule' (O. 42 r. 5 of the Rules of the High Court) or within the exceptions expressed in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. In this case neither of these B exceptions applies.

[14] A similar approach was followed in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 at p. 144, Chang Min Tat FJ delivering the decision of the Federal Court held:

C ... quite clearly he should have considered himself *functus officio* after having considered the contentions raised at this proceeding and refused to do anything about it on the ground of lack of jurisdiction and he should have left it to the respondent to commence a fresh action to set aside the foreclosure order on the ground of fraud. The right practice was pointed out to him and his attention was drawn to the cases directly in D point.

Unless he could distinguish them, he was bound by them.

Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order E 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: *Re St Nazaire Co* 12 Ch D 88, *Kelsey v. Doune* [1912] 2 KB 482; *Hession v. Jones* [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing.

F **[15]** In *Tio Chee Hing v. Tractors Malaysia Bhd* [1972] 1 LNS 157; [1973] 1 MLJ 66 at p 67, the Federal Court pronounced authoritatively as follows:

... With that observation of the learned judge I agree, but only to the extent that the appeal would have failed solely on the ground that after a judgment has been passed and entered, even though it may have been G taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose, unless there has been a clerical mistake or an error arising from an accidental slip or omission in the judgment, or the judgment as drawn up does not correctly state what the court actually decided and intended to decide, in either of which cases an application under Order 28, rule 11 of the Rules of the H Supreme Court, 1957 for the rectification of the judgment can be made in the same action. (See *Ainsworth v. Wilding* [1896] 1 Ch 673).

[16] Again in *Khaw Poh Chhuan v. Ng Gaik Peng (F) & Yap Wan Chuan & 9 Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761 at p 782 the Federal Court reiterated as follows:

I It is well established that a perfected consent order can only be set aside in a fresh action filed for the purpose: see eg, *Huddersfield Banking Co Ltd v. Henry Lister & Sons Ltd* [1895] 2 Ch 273. The consent order was given

in Originating Summons No 209/1973. It is now sought to have it set aside in the subsequent and separate civil suit concerned in the instant appeal. The civil suit is of course the fresh action for the purpose of setting aside the consent order.

[17] However we must make a distinction here between a proceeding in a civil claim and that made as part of the proceedings in a Winding-Up Court. Here it would be pointless to start a fresh proceeding as the challenge at the end of the day is against the decision of the Liquidator in agreeing to sign the relevant memorandum of transfer with respect to a sale by the Liquidator.

[18] It is primarily an application made, as learned counsel for Koh, Mr Raj Shankar pointed out, under ss. 236(3) and 279 of the Companies Act 1965.

[19] Section 236(3) reads:

> The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

[20] Section 279 further provides as follows:

> Any person aggrieved by any act or decision of the liquidator may apply to the Court which may confirm reverse or modify the act or decision complained of and make such order as it thinks fit.

[21] The reference to the "court" would mean the "Winding-Up Court" and any application arising out of any matter in the course of a Winding-Up should be referred to the Winding-Up Court. There is no necessity to file a fresh action.

[22] The rationale was succinctly stated in *Watta Battery Industries Sdn Bhd v. Uni-Batt Manufacturing Sdn Bhd And Chow Siew Hon & Ors (Interveners)* [1993] 1 CLJ 555; [1993] 1 MLJ 149 at p. 563 (CLJ); p. 161 (MLJ) as follows under the Canadian Companies Act s. 371(2) which is the equivalent of our s. 226(3):

> The real justification for s. 371(2) is to be found elsewhere. Its purpose is to avoid the inconvenience and expense of litigation and to oblige all claimants to submit to the procedural scheme established in winding up. In the words of a Canadian judge:
>
> > It must be kept in view that the intention of the Winding Up Act and of all legislation respecting insolvency is to get within the control of the court all the estate of the insolvent company, to settle there all the claims of debt, privilege, mortgage, lien, or right of property upon, in or to any effects or property of such company in the simplest and least expensive way, and to distribute its assets

A among its creditors in the most expeditious manner possible and not to have the proceedings of the winding up court or the distribution of the assets delayed or impeded by or dependent upon outside or expensive litigation in other courts.

Towards avoiding such 'outside or expensive litigation in other courts', **r. 163 provides for the transfer to the winding-up court of any action, cause or matter pending, brought or continued by or against the company**. (emphasis added)

[23] Even if I were wrong, I would fall back on r. 194 of the Companies (Winding-up) Rules 1972 which is a saving clause designed to focus on the substantial justice of the matter and not superficial technicalities. It reads:

194. Formal defect not to invalidate proceedings

(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

[24] As all the parties that may be affected by the setting aside of the consent order are before the court with ample opportunities for the Bank, the Liquidator and the Contributory Koh and even the new purchaser Symphony to be heard, no one can complain of any injustice suffered as a result of this procedure followed.

Whether The Lien-holder's Caveat May Be Lodged After Judgment Has Been Taken On The Loan

[25] Ordinarily a lien-holder's caveat is entered against a borrower's land as a quick security before a loan is advanced. It is cheaper and quicker form of security and generally used for a short term loan. However in this case, the title had been deposited with the Bank when the loan was granted but the lien-holder's caveat was not entered until 1995 some six years after judgment had been taken on the loan.

[26] The position of the Bank seems to be that it is an equitable mortgagee having custody of the title as security for the loan. The lien-holder's caveat may be entered later and the Bank would not lose its priority unless by its conduct it is estopped from asserting its priority. In *Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh* [1969] 1 LNS 106; [1969] 2 MLJ 196 a lien-holder's caveat was entered against a borrower's land after judgment had been entered on the loan given. The applicant had applied for an order for sale of the lands of the borrower over which a caveat had been entered on the loan given. The facts are as succinctly summarised below at p. 197 as follows:

The facts in their chronological events are not disputed. In October 1964 How Han Teh deposited the documents of title over the said land with the applicants for the purpose of securing a loan. He failed to repay the

loan and on 28th April, 1966 judgment for the sum of $217,085.71 was entered against him. On 19th May, 1966 a bankruptcy notice was issued against him and that was served on him on 9th June, 1966. On 17th June, 1966 he failed to pay up the monies and thus committed an act of bankruptcy. On 2nd August, 1966 the applicants registered caveats against the titles deposited with them as security under the provisions of section 330 of the National Land Code. A petition was subsequently filed against him on 5th October 1966 and receiving and adjudication orders were made against him on 19th November, 1966. The said How Han Teh died in April 1967, intestate. Since the date of judgment the applicants have received a sum of $30,683.63 to account. The principal sum now due is $186,401.72. The applicants are apparently the only creditors of the said How Han Teh and there are virtually no other assets of the bankrupt other than these lands which are valued at $18,000.

The application is opposed by the Official Assignee in pursuance of section 47 of the Bankruptcy Act, 1957 read with section 281(1) of the National Land Code. Section 47(1) of the Bankruptcy Act provided that the bankruptcy shall relate back to and commence at the time of the act of bankruptcy being committed, upon which the order is made. Section 281(1) of the National Land Code provides that the depositee of the issue document of title shall become entitled to a lien if he had registered a lien-holder's caveat under Chapter 1 of Part Nineteen of the Code.

[27] The Bank had failed to enter a caveat but continued to retain possession of the issue document of title. In holding that the Bank's failure to lodge a caveat under the FMS Land Code did not prejudice its right in equity, Raja Azlan Shah J (as the late Royal Highness then was) said at p. 197:

In other words, although failure to lodge a caveat does not entitle the depositee with whom the issue document of title is deposited, to a lien under the Code, he still possess a right to it in equity. **He can exercise that right be registering the caveat under section 134 at any time**. (emphasis added)

[28] His Lordship concluded that the Bank had done nothing to forfeit its priority and observed at p.198 as follows:

"Therefore, *prima facie* the applicants who are prior in time must succeed unless it can be shown that he had relied on something tangible and distinct having grave and strong effect to accomplish the purpose: see *Shropshire Union Railway and Canal Co v. The Queen*. In the present case the substantial complaint against the applicant is that they had failed to register the caveat before the act of bankruptcy was committed. That, as had been perceptively said in *Shropshire Union* case is not conduct of a character "which would operate and ensure to forfeit and take away the pre-existing equitable title". The applicants had not parted with the documents of title. **They retained possession of them all the time and it is open to them to register the caveat at any time. In my judgment, they had done nothing to forfeit their priority**. (emphasis added)

Whether The Lien-holder's Caveat Remains Valid Until Withdrawn By The Bank Or Cancelled By The Registrar Or By The Court

[29] *Halsbury's Laws of England*, vol. 28 (4th edn., Reissue) at p. 352 defines a 'lien' as follows:

> In its primary or legal sense 'lien' means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied.

[30] The lien-holder's caveat is still on the land to secure the judgment sum. No frontal attack on it by way of removing it or declaring it null and void has been made. I recall the *dicta* of Peh Swee Chin FCJ in *Khaw Poh Chhuan v. Ng Gaik Peng (F) & Yap Wan Chuan & 9 Ors* [1996] 2 CLJ 185; [1996] 1 MLJ 761 at p. 209 (CLJ); pp. 779-780 (MLJ) where His Lordship speaking for the Federal Court observed as follows:

> The implication of the quoted passage above is indeed **there is no such thing as a void caveat unless it is removed in accordance with the procedure provided both for its creation and removal in the Code**. Let us discuss it briefly from various angles.
>
> It would indeed bring anarchy to the Torrens system of land registration if anybody, without applying to remove a caveat in accordance with the established procedure, could argue it is void whenever he sees it fit to raise it in any proceeding laterally, thus undermining a caveat's efficacy and a pillar of strength of the Torrens system.
>
> We have gone through a large number of cases, there could be, but **we have found no cases where a caveat was allowed to be challenged as being void without the invoking of procedure for its removal or its continuation involved at the same time in these cases**. Thus this large number of cases would seem to give support to the requirement for its removal in accordance with the procedure laid down, before one could speak of the voidness of such a caveat, and the express provision of such procedure in the Code, in itself, is also eloquent testimony of such requirement. (emphasis added)

[31] By way of analogy one can compare this situation with that of a registered owner trying to obtain vacant possession and the defence raised is that the registered owner had obtained his title illegally or fraudulently. In *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703 at. p. 712 it was pointed out as follows:

> As for authority, I need go no further than *Teh Bee v. K Maruthamuthu* [1977] 1 LNS 134 FC, which supports the proposition that if the registered proprietor acquired his title unlawfully, that is to say, in breach of written law, he may nevertheless assert it against the whole world until proceedings are brought to remove him from the register.

[32] Further at p. 713 it was held: A

> The plaintiff brought an action against the defendant in the magistrate's court for vacant possession. In his defence, the defendant denied that the plaintiff was the registered proprietor of the land. He said that the State Authority had acted unlawfully in issuing the title to the plaintiff. He also said that the plaintiff's title was invalid because it had been obtained by B fraud, misrepresentation and by unlawful means. He however did not file an action against the plaintiff and the State Authority claiming a declaration of invalidity and consequential orders. **There was simply no frontal attack on the plaintiff's title**. This proved fatal. Because, what remained was only the issue whether the plaintiff's name appeared on the register. It did. And on that ground she was entitled to succeed. C
>
> [6] So too here. The plaintiffs (respondents before us) are the registered proprietors of the land in question. There is no frontal attack upon their title. They are therefore entitled to vacant possession of the land. (emphasis added)

[33] There are only a few limited ways to determine the lien-holder's D caveat under s. 331 of the NLC which provides as follows:

> 331. Determination of lien-holders' caveats.
>
> (1) A **lien-holder's caveat may be withdrawn at any time by a notice in writing given to the Registrar by the person or body for the time being entitled to the benefit of the lien**, and the Registrar shall cancel the entry of the caveat as soon as may be after the notice is received. E
>
> (2) Where any land or lease subject to a lien-holder's caveat is sold pursuant to an order of the Court made by virtue of subsection (2) of section 281: F
>
> (a) **any certificate of sale presented for registration by the purchaser** thereof shall be deemed for the purposes of this Chapter to have been presented with the consent of the lien-holder; and
>
> (b) upon the registration of the certificate, the caveat shall lapse, and the entry thereof be cancelled accordingly by the Registrar. G
>
> (3) *The Registrar may cancel any lien-holder's caveat upon proof to his satisfaction that all sums due under the lien have been duly paid.*
>
> (4) Where the **Court is satisfied that any lien-holder's caveat ought not to have been entered, or ought to have been withdrawn**, it may order: H
>
> (a) the cancellation thereof by the Registrar, and
>
> (b) if the entry or failure to withdraw has caused damage or loss to any person or body, the payment of compensation by the person or body at whose instance the entry was made or, as the case may be, by whom the withdrawal ought to have been effected. I

A

(5) On cancelling the entry of any caveat pursuant to this section, the Registrar shall note on the register document of title the reason for the cancellation and the date thereof; and where any such entry is cancelled by reason of the withdrawal of the caveat, the Registrar shall give notice of the withdrawal to the person or body for the time being entitled to the land or lease formerly affected.

B

(6) Every cancellation under sub-section (5) shall be signed and sealed. (emphasis added)

[34] If the Registrar were to remove the lien-holder's caveat, he must be satisfied that all sums due under the lien has been fully paid. There is no evidence from Koh that the judgment sum has been paid and all evidence point to the fact that the judgment sum is still outstanding. Indeed Koh in contending in writing to the Bank by his letter dated 21 October 2013 in exh. KH5 encl. 14 that the land should not have been sold for RM1.2 million but that it should be sold for RM1.4 million, is in effect making an admission that there is a debt outstanding which has not been satisfied and that the only complaint is the proposed price at which the land is to be sold.

[35] It has to be pointed out that on 13 December 2013 Koh had lodged a private caveat on the land so as to prevent the transfer of the land to the said purchaser. The said private caveat had been removed by this court on 3 June 2014 *vide* Originating Summons No. 24 NCvC-223-05/2014. In that proceeding, Koh had admitted in his Statutory Declaration dated 13 December 2013 in support of his application to lodge a private caveat on the land that the respondent company here had taken a loan from the Bank and that the said land has been pledged as a security (exh. "RG 2" in the affidavit in reply of the Bank in encl. 11). He also stated the same in the Form 19B application for the private caveat to be entered in the same exhibit. Koh also exhibited a company search of the company which clearly showed that there are loan taken by the company from the Bank and the same remained unsatisfied. The company search was printed out on 20 May 2014.

[36] The judgment debt having been secured by way of the entry of the lien-holder's caveat and a deposit of title with the Bank, that security remains intact and upon payment of the judgment debt by the company, the security in the title deposited will be returned to the company and the caveat removed by the Bank.

[37] However Mr Raj Shankar proceeded to contend that the lien-holder's caveat is void as against the Liquidator for non-registration with the Registrar of Companies under s. 108 of the Companies Act 1965 which reads as follows:

I

108. Registration of charges

(1) Subject to this Division where a charge to which this section applies is created by a company, there shall be lodged with the Registrar for registration within thirty days after the creation of the charge a

statement of the prescribed particulars, and if this section is not complied with in relation to the charge, the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.

[38] Assuming for a moment that registration is required, then the effect of non-registration is that under s. 108(2) the money secured thereby shall immediately become payable. Section 108(2) reads:

(2) Nothing in subsection (1) shall prejudice any contract or obligation for repayment of the money secured by a charge and when a charge becomes void under this section, the money secured thereby shall immediately become payable.

[39] Section 108(3) further enumerates the charges referred to in s. 108(1) and it is clear that it does not include a lien-holder's caveat. It reads:

(3) The charges to which this section applies are;

(a) a charge to secure any issue of debentures;

(b) a charge on uncalled share capital of a company;

(c) a charge on shares of a subsidiary of the company which are owned by the company;

(d) a charge or an assignment created or evidenced by an instrument which if executed by an individual within Peninsular Malaysia and affecting property within Peninsular Malaysia would be invalid or of limited effect if not filed or registered under the Bills of Sale Act, 1950 [Act 268];

(e) a charge on land wherever situate or any interest therein;

(f) a charge on book debts of the company;

(g) a floating charge on the undertaking or property of a company;

(h) a charge on calls made but not paid;

(i) a charge on a ship or aircraft or any share in a ship or aircraft;

(j) charge on goodwill, on a patent or licence under a patent, on a trade mark, or on a copyright or a licence under a copyright; and

(k) a charge on the credit balance of the company in any deposit account.

[40] The Federal Court's decision in *Paramoo v. Zeno Ltd* [1968] 1 LNS 95; [1968] 2 MLJ 230 is very crystal clear on this. It dealt with the then s. 80 of the Companies Ordinance which provision is similar to s. 108 of the Companies Act 1965. As observed by Suffian FJ (as the then LP then was) at p. 232:

A Liens over land owned by a company do not have to comply with s. 80 of the Companies Ordinance, because that section applies only to charges. Charges are not liens. The charges subject to section 80 are enumerated in subsection (2) and liens are not included in the list.

[41] Mr Raj Shankar's reliance on *Ngan Khong v. Bamah Pakeh Jamin Rasid*
B *Luha* [1935] 1 LNS 42; [1935] MLJ 167, where it was held that a lien was analogous to an equitable mortgage, as authority then for the need to comply with registration of the lien with the Registrar of Companies is misplaced in the light of the clear enumeration under s. 108(3) as to what instruments would require registration with the Registrar of Companies.

C *Whether The Contributory Koh Can Raise The Defence Of Limitation In That The Lien-holder's Caveat Was Entered In 1995 After Judgment On The Loan Had Been Entered In 1989 And The Bank Has Not Proceeded With An Order For Sale*

[42] Here the Bank had taken custody of the title to the land upon a loan being granted to the Company. Upon default of the loan, the Bank sued the
D Borrower Company and its guarantors and obtained summary judgment. Against that judgment obtained in 1989 there has been no appeal. The Bank only entered a lien-holder's caveat against the land in 1995. The Bank had not proceeded to obtain or for that matter apply for an order for sale.

E **[43]** Learned counsel for the contributory Koh, Mr Raj Shankar, submitted that limitation has set in by virtue of s. 21(1) of the Limitation Act 1953. The section reads:

> 21. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land
>
> F (1) No action shall be brought to recover any principal sum of money **secured by** a mortgage or **other charge on land** or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued. (emphasis added)

G **[44]** The fact that a lien-holder under a lien-holder's caveat is subject to s. 21(1) of the Limitation Act 1953 has been clearly affirmed in the Court of Appeal in *Perwira Affin Bank Bhd v. Selangor Properties Sdn Bhd & Ors* [2010] 3 CLJ 45 at p. 57 as follows:

H [29] Section 21(1) of the Limitation Act 1953 (Revised 1981) enacts as follows:

> 21. Limitation of actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land
>
> I (1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

[30] The words **"other charge on land"** that appear in the above mentioned section would refer to other encumbrances to which the land is subjected to and that would necessarily include an equitable charge or **lien, statutory or equitable**, which arises as a result of depositing a title deed with the lender (*Manilal & Sons (M) Sdn Bhd v. Mahadevan Mahalingam & Anor* [1986] 2 CLJ 2; [1986] CLJ (Rep) 26 PC; and *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230 FC). (emphasis added)

[45] To him, the date when the right to receive the money accrued, is the date the lien-holder had obtained judgment with respect to the loan and that was in 1989. Twelve years from 1989 would be the year 2001 for the Bank to proceed with an application for an order for sale. As the Bank had not proceeded with an application for an order for sale, the Bank is now barred by limitation. If the Bank cannot proceed with an order for sale, the Liquidator should not have consented to sell the land secured by the lien-holder's caveat.

[46] Section 281(2) NLC provides that once judgment has been obtained for the amount secured, the lien-holder shall be entitled to apply to court for an order for sale. Section 281(1) to (3) NLC read as follows:

281. Creation, and effect, of liens

(1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body:

(a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien-holder's caveat; and

(b) shall, upon the entry of such a caveat, become entitled to a lien over the land or lease.

(2) Where **the holder of any lien has obtained judgment** for the amount due to him thereunder, **he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land or lease**.

(3) Any such application shall be made in accordance with any law for the time being in force relating to civil procedure; and the provisions of **sections 257 to 259 and section 266 to 269 shall apply, *mutatis mutandis*, where any such application has been made as they apply where a chargee applies for an order under section 256**. (emphasis added)

[47] The above argument is a very persuasive one. Mr Raj Shankar was fortified in this view as when it comes to an order for sale application only the provisions of ss. 257 to 259 and ss. 266 to 269 shall apply, *mutatis mutandis*, to an order for sale as they apply to a Chargee applying for an order for sale under s. 256. What is noticeably excluded is the provision with respect to the service of a Form 16D or Form 16E under ss. 254 and 255 NLC. Mr Shankar's argument is that once judgment has been obtained for

A the loan secured, limitation begins to run for at that moment the lien-holder is entitled to apply for an order for sale for from then it has the right to receive the money accrued under s. 21(1) Limitation Act.

[48] I am not unaware that in cases of a charge action for recovery time starts to run from the date of demand for repayment is made, ie, from the B time either Form 16D or 16 E, as the case may be, is served on the borrower. The Annotated Statutes on Limitation Act 1953 at p. 158 summarised as follows:

> The date when the right to receive money accrued. Time starts to run on from the date the demand for repayment is made: see *United Malayan* C *Banking Corp v. Yap Peng Wai* [1998] 5 MLJ 511, (this case involves a foreclosure action to recover money secured by charge), following *Wee Kee Puan v. Oversea-Chinese Banking Corp Ltd* [1982] 1 MLJ 64, FC. See also *Perwira Affin Bank Bhd v. Lim Weow* [1998] 3 MLJ 56, CA where time was held to run from the time the charger defaulted in her obligation to make D payment after being served with the Form 16E notice pursuant to the National Land Code (Act No. 56 of 1965) ((1) 3 lands) and *Malayan Banking Bhd v. Zainon Ismail* [2001] 3 CLJ 564, where time was held to run from the defendant defaulted in her obligation to make payment after being served with a form 16E notice.

E **[49]** In *Perwira Affin Bank Bhd v. Lim Weow* [1998] 4 CLJ 17, the Court of Appeal in considering s. 21 (1) of the Limitation Act 1953, held at pp. 24-25 that:

> "The right to receive the money accrued" in s. 21(1) must refer to the time when the respondent defaulted in her obligation to make payment after being served with the Form 16E notice. Time then starts to run.

F **[50]** That case was one where there was a charge created over the property. Therefore a notice under Form 16E must be sent. However for a lien-holder's caveat there is no requirement for a notice in Form 16D or 16E to be sent. The date of default is the date of judgment. In the case of an G application for an order for sale of a land secured under a lien-holder's caveat, the entitlement to an application for an order for sale runs from the date judgment is entered for the loan taken. From that date on 6 December 1989 the Bank would be perfectly entitled to apply for an order for sale by entering the lien-holder's caveat on the land. However it did so only in 1995 but that does not stop time to start to run from the date judgment was taken H for the loan.

[51] The Bank contended that the issue of limitation was never raised in Koh's affidavit. Section 4 of the Limitation Act 1953 provides as follows:

> Nothing in this Act shall operate as a bar to an action unless this Act has I been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

[52] However, I am mindful of the observation of the Court of Appeal in *Tham Kok Onn v. Perwira Habib Bank Malaysia Bhd* [2004] 4 CLJ 818; [2005] 3 MLJ 338 where it was held that s. 4 of the Limitation Act 1953 does not apply to a summons action because by definition 'pleading' does not include a petition, summons or preliminary act (see O. 1 r. 4 RHC). Further, the requirement to plead statute of limitation as a defence is contained in O. 18 r. 8 RHC which relates to writ action and not to a summons. Under the new O. 1 r. 4 of the Rules of Court 2012 definition, 'pleading' does not include a notice of application or a preliminary act.

[53] Be that as it may, this is not an application for an order for sale by the Bank. If the Bank had proceeded with an order for sale, perhaps Koh may then raise the fact that as limitation has set in, that would be "cause to the contrary" under s. 256(3) NLC. The plea of limitation is not relevant as against the Liquidator for reasons to be considered below.

Whether Limitation Would Run In A Sale By The Liquidator When The Respondent Company Was Wound Up In 1999

[54] It must also not be forgotten that the sale here is not by the Bank as a lien-holder but by the Liquidator. Time does not run against the Liquidator where the disposal of the assets of the company in liquidation is concerned.

[55] For the sake of argument, assuming that the defence of limitation has been properly raised and is relevant at this stage of the proceeding, how then would it affect the issue of the Bank realising its security under the lien created? It will at most make the Bank an unsecured creditor if an order for sale cannot be applied for or proceeded with. The judgment obtained on 6 December 1989 was still recoverable as the Bank had 12 years that is until 5 December 2001 to apply for an order for sale. Before that time was up, the Company went into liquidation in 1999. Time would stop running against the Bank as a creditor. There are several authorities supporting this proposition of time stopping to run against creditors the moment the debtor company is in liquidation.

[56] Sections 20(1) and (2) of the Limitation Act 1980 (UK) is in *pari materia* with our ss. 21(1) and (2) with regard to the period of limitation actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land. *Halsbury's Laws of England* Fourth edn. 1996 reissue vol. 7(3): at p. 1730 states as follows:

> 2518. Statute-barred debts. Time under the Limitation Act 1980 ceases to run against a creditor on a winding-up order being made; and he is allowed to prove at any time before the company is dissolved, subject to the ordinary rule as to not interfering with dividends already paid. A proof in respect of claims statute-barred before the order is not allowed.

[57] The same position had been take in the case of *Re General Rolling Stock Co Ltd, Joint Stock Discount Co's Claim* [1872] 7 Ch App 646, where it was held at pp. 648 to 650, as follows:

> It cannot have been intended that in the case of a clear demand an action should be brought merely in order to avoid the Statute of Limitations. The property of the company is in the custody of the Court (sects. 92, 94, 95), and by sect. 98 the Court is to see the assets applied in discharge of the liabilities of the company, which must mean its liabilities existing when it is ordered to be wound up. Sect. 107 shows the extent of the consequences of not coming forward to prove in due time. Where a decree is made in a creditor's suit the statute does not run after filing the bill: *Sterndale v. Hankinson*.

[58] Further at pp. 649-650:

> It appears to me to be the clear meaning of that section, that the assets should be applied in satisfaction of all the liabilities which existed at the time of the winding-up order. That being so, I think we must consider that the Legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors, or under a decree of the Court of Chancery, in an administration suit. In these cases the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets, and that the Statute of Limitations does not run against this claim, but, as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend.

[59] Likewise, in the case of *Re Cases of Taff Wells Ltd* [1992] BCLC 11, Judge Paul Baker QC, at p. 15 elucidated the position as follows:

> It is, however, an over simplification to say that the period ceases to run on the making of the winding-up order or the passing of a resolution to wind up. The true question, as I see it, is whether the original contracts of the creditors were discharged by operation of law and replaced by other rights before time had run out by which actions would have had to be brought to enforce them. It is not simply that time has stopped running against the creditor; the cause of action itself is destroyed and replaced by other rights.

[60] A similar position was considered in the case of *Re Overmark Smith Warden Ltd* [1982] 3 All ER 513, where Slade J at p. 519 held as follows:

> Accordingly, the liquidator is entitled to allow only those creditors who establish that their debts are not statute-barred to participate in the distribution of the company's assets. All the claims of the relevant creditors are founded on contract. Section 2(1)(a) of the 1939 Act provides that action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. The commencement of a liquidation stops time running in favor of the creditors of a company.

[61] Mr Raj Shankar has submitted that in his "Further Submission (2) on behalf of Applicant Koh" at p. 7 as follows:

> 4. In the circumstances, the liquidator having now found that the lien by the Bank is now unenforceable should take into his custody the said Land under S. 233 of the Companies Act 1965 and proceed to realise the assets i.e. the said Land and distribute the dividends to the unsecured creditors who have filed their proof of debts.
>
> 5. The Bank is not left without recourse. Since it had obtained judgment on 06-12-1989, it has twelve (12) years to enforce the principal sum and six (6) years to claim interest (S.6(3) of the Limitation Act 1953). Since the winding up Order was made on 26-05-1999, according to Taff's case, time stops running then. The Bank as an unsecured creditor may now file its proof of debt for its claim of moneys under the judgment dated 06-12-1989. It is up to the Official Receiver to accept or otherwise the said proof of debt. That is subject to the Official Receiver's discretion.
>
> 6. If the Bank's proof of debt is accepted then it has to wait for distribution of the dividends after the realisation of the assets by the Official Receiver in the order of priority as stated in S. 292 of the Companies Act 1965.

[62] Mr SP Veloo, learned counsel for the Bank is prepared to accept the fact that the OR as Liquidator might take the view that since it is being asked to dispose of the land of the company in liquidation, it might well decide that the proceeds of sale is to be shared with the other creditors *pari passu*. One other creditor from the Liquidator's report dated 20 June 2014 is the Inland Revenue of Malaysia. The debt due is RM569,595.92 in the Liquidator's report filed with the court.

[63] Mr S P Velloo takes the stand that that would be outside the scope of Koh's application and should there be a dispute on the distribution of the proceeds of sale by the Liquidator, parties affected may appeal against the decision of the Liquidator under s. 279 of the Companies Act 1965. With that I agree.

Whether In All The Circumstances Of The Case The Liquidator's Sale Of The Company's Land Ought To Be Set Aside

[64] The company being in liquidation, all its assets are vested in the Liquidator and the directors of the company have no powers to deal with it as they are *functus officio*. This position was clearly reiterated in the case of *American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506 Ramly Ali JCA (now FCJ) in delivering the judgment of the Court of Appeal stated at pp. 517 to 518 as follows:

> It is trite law that once a company is wound up, the board of directors of the company becomes *functus officio*. The liquidator displaces the directors and the control of the activities of the company is vested with the liquidator. No one but the liquidator can act for the company. The

directors however have the residual powers to bring an appeal against the winding-up order (see: *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* (*supra*); *Taman Sungai Dua Development Sdn Bhd v. Goh Boon Kim* [1997] 2 CLJ 315; *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd* [2004] 7 CLJ 409).

When a winding-up order is made, the directors of the company remain in office but their powers are removed. While the company is in the process of being wound up a person cannot perform or exercise, and must not purport to perform or exercise a function or power as an officer (other than a liquidator) of the company, except with the approval of the liquidator or the court.

[65] The powers of the liquidator to sell immovable assets of a company under liquidation is contained in s. 236(2)(c) Companies Act 1965 which provides as follows:

(2) The liquidator may:

...

...

(c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels.

[66] The fact that the Liquidator has such a power was considered in *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; [2007] 3 MLJ 571 where at pp. 534-536 (CLJ); pp. 583-584 (MLJ), Ramly Ali J (now FCJ) held as follows:

Here, the applicant seeks to advance the proposition that in the case of a company in liquidation, the liquidator is powerless to sell property if it is subject to a charge. With regards to this allegation, the court finds that the liquidator is embarrassed and surprised, as this purported issue was never raised in either the applicant's application (which was devoid of particularisation as to its focus) or its supporting affidavits. The applicant should not be allowed to conduct its case surreptitiously without allowing a chance for a proper response.

In any event, with respect, this argument is critically flawed and/or misconceived.

The first respondent company is being under liquidation. The following is apparent and clear:

(a) the liquidator who was appointed by this court takes control of the first respondent pursuant to the winding up order;

(b) the liquidator is tasked with statutory duties and responsibilities to wind up the first respondent and dissolve the first respondent; and

(c) in doing so the liquidator would have to realise its assets to obtain proceeds to repay its creditors. The sale of the said land was therefore pursuant to such duties and responsibilities.

It is patently trite that in accordance with the abovementioned duties, the liquidator is empowered to sell property belonging to the first respondent and this is entrenched in s. 236(2)(c) of the Companies Act 1965 which states:

> the liquidator may sell the immovable and movable property ... of the company by public action, public tender or private contract with power to transfer the whole thereof in any person or company or to sell the same in parcels.

Section 236(2)(c) also dispels any doubt as to whether the sale can be done by title liquidator by way of a private treaty and/or whether the liquidator must obtain court sanction before proceeding. Clearly, the liquidator can do so without having to obtain court sanction prior to the sale.

The position remains unchanged even if the property was subject to a registered charge. The liquidator can still sell the property, but always subject to the right soft the chargee (HSBC). Under the Torren system practiced in Malaysia the law and mechanisms put in place, polices itself:

(a) a chargor may try to sell the property by consulting the charge but the property subject to the registered charge can never be sold free of encumbrances. Accordingly, no right-minded purchaser would buy the property subject to such an encumbrance;

(b) the charger therefore has to liaise with the charge to obtain its consent to a sale in order that the charge issues a discharge of charge to up lift the charge; and

(c) the charge itself would also insist on protecting its own interest. After all, the charge was granted to the chargee as security. By reason of the charger's default, there is all outstanding sum payable to the chargee and the right to exercise the security is activated. The chargee could opt to sell the property or it could allow the chargor to sell the property. By choosing the latter, the chargee would invariably only grant its consent subject to the proceeds of the sale being paid directly to it to offset the outstanding sums. If the proceeds of sale were higher than the outstanding sum, that portion would be paid directly to the chargor. This is in no way unfair and/or unusual.

What the applicant is suggesting here cannot hold water. *If one were to lead his proposition to its conclusion, the liquidator would have to it put and cross it hands, being powerless on its own to sell the said land and therefore unable to complete the liquidation of the first respondent. This could never have been the intent of Parliament and/or common law*. (emphasis added)

[67] Similarly what the Liquidator did in this case is merely to exercise its power of sale of the company's land whether there is a lien-holder's caveat or otherwise over the land. It is part of the Liquidator's duty to realise the

proceeds of sale to pay creditors including the Inland Revenue Department at whose instance the company was wound up. There is nothing *mala fide*, unreasonable, unfair or unusual in the exercise of the Liquidator's power. Whether the Liquidator should decide to distribute the proceeds of the sale to the Bank in priority as a secured creditor or that the Bank is an unsecured creditor for its failure to proceed with an order for sale within the 12 years period, is a decision of the Liquidator that would be appealable to this court. For that matter the contributory Koh can even take the position that the Bank has ceased to be a creditor as the debt secured is now unrecoverable because of limitation having set in.

[68] However for the moment there is no good reason for anyone to stop the Liquidator's sale.

[69] In *Leon v. York-O-Matic Ltd* [1966] All ER 277 Plowman J refers to s. 245(3) and s. 246(5) of the English Companies Act 1948 (which are *pari materia* to our ss. 236(3) and 279). His Lordship goes on to compare the same to s. 80 of the English Bankruptcy Act 1914, and then proceeds to hold that since it is identical to s. 246(5) of the English Companies Act 1948, by analogy the principle governing the court's power under s. 80 of the English Bankruptcy Act 1914 is also applicable to cases where applications are based on either ss. 245(3) or 246(5) English Companies Act 1948.

[70] At p. 279 it was observed as follows:

[71] I am afraid it is still not clear to me whether the present application is one under either of those subsections. The plaintiff does not anywhere say that it is. But let me assume in his favour that it is an application to one of those subsections, then I have to consider what are the principles applicable in such a case.

[72] At p. 280:

> There is some authority under that section to which I have been referred and to which I shall refer, because it seems to me that the principles which have been laid down as to the exercise of the court's power under section 80 of the Bankruptcy Act, 1914, are by analogy applicable to a case of an application to the court under the Companies Act, 1948, whether under section 246(5) or under section 245(3).

[73] At p. 280 His Lordship states the legal principles applicable when the courts are asked to interfere with the powers of the liquidator:

> The first of the cases to which I shall refer was *Re Peters, Ex parte Lloyd* [1882], 47 LT 64, which was a decision in the Court of Appeal, the judgment being delivered by Sir George Jessel MR. I will read the whole of it. He said this (1882), 47 LT at p 65):
>
> > Section 20 of [the Bankruptcy Act, 1989] provides that, 'subject to the provisions of this Act, 'and to the directions of the creditors given by resolution at any general meeting, the trustee 'shall

> exercise his own discretion in the management of the estate, and its distribution amongst the creditors'. A portion of the duty of the trustee is to sell the property of the bankrupt. Therefore, subject to the resolution of the creditors, he has to exercise his own discretion as to the time and mode of sale. In the present case the trustee, in the exercise of his discretion, did not purpose to sell the contingent reversionary interest. Independently of the resolution of the creditors against the sale, there is no *locus standi* for any one creditor to interfere and ask the court to order a sale, except on the ground that the trustee has not exercised his discretion *bona fide*. Here the appellant says that the refusal to sell is an absurd exercise of the discretion of the trustee. *But the court will not interfere unless the trustee is doing that which is so utterly unreasonable and absurd that no reasonable man would so act. He is certainly not doing anything of the kind in the present case, and, in my opinion, the appeal ought to fail.*

Brett and Holker L JJ concurred.

The other case in point is a decision of Harman J. in *Re A debtor* (No 400 of 1940). *Ex p The Debtor v. Dodwell (The Trustee)* [1949] 1 All ER 510: [1949] Ch 236. I propose to read two or three sentences from the judgment of Harman J. He said [1949] 1 All ER at p 512; ([1949] Ch at p 241):

> It seems to me clear that there must be circumstances in which the court can interfere at the instance of a bankrupt to control the actions of the trustee: this is apparent from the terms of s. 80 itself, and is confirmed by the all-embracing language of s. 105.

Similarly here there must be circumstances in which the court will interfere at the instance of a creditor, because the two subsections of sections 245 (3) and 246 (5), to which I have already referred say so. Harman J goes on ([1949] 1 All ER at p 512; [1949] Ch at p 241):

> I need not, I think, attempt to define what these circumstances are. *They cannot, I think (in the absence of fraud), justify interference in the day-to-day administration of the estate, nor entitle the bankrupt to question the exercise by the trustee in good faith of his discretion, nor to hold him accountable for an error of judgment. Administration in bankruptcy would be impossible if the trustee must answer at every step to the bankrupt for the exercise of his powers and discretions in the management and realisation of the property*. (emphasis added)

[74] This was followed in *Harold M Pitman & Co v. Top Business Systems (Nottingham) Ltd* [1984] BCLC 593. Nourse J in approving and adopting the judgment of Plowman J in *Leon v. York-O-Matic*, said (at p. 597):

> As to that I must say that not only do I respectfully think that Plowman J. correctly applied the law as set out in the two earlier bankruptcy cases, but also that I share his view that the law so stated is correct. *It does seem to me that it would run very contrary to the view which the Companies Court has always taken of the desirability of a liquidator, whether in a winding-up by the Court or in a voluntary winding-up being able to exercise his powers without undue fetters if I were to say that there should be some lower standard to be established in order to enable the Court to intervene*. (emphasis added)

[75] Our Malaysian courts have adopted the same approach in the case of *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd & Anor* [2007] 7 CLJ 516; [2007] 3 MLJ 571 where a similar issue was considered and Ramly Ali J (now FCJ) held, at pp. 533-534 (CLJ); pp. 582-583 (MLJ):

> By reason of the lack of particularisation in encl 37, one can only surmise that as a contributory, the applicant seeks to challenge the decision of the liquidator in selling the said land under these provisions.
>
> In this regard, the case of *Chin Ah Keow @ Chin Lai Sitt v. Anggun Pintas Sdn Bhd & 3 Ors* [2005] 1 LNS 92 appears to be relevant to the present facts. In that case, the plaintiff had also sought to challenge the decision of the liquidators (second and third defendants) appointed over the first defendant in accepting a tender submitted by the fourth defendant pursuant to s. 279 of the Companies Act 1965. In arriving at its decision as to the test to be met, the court referred to the following cases with approval:
>
> (a) In *Re Edennote Ltd Tottenham Hotspurs PLC & Ors v. Ryman and Anor* [1995] 2 BCLC 248 where it was held that the court could only interfere with the exercise of a liquidator's decision to sell the assets of an insolvent company in very exceptional circumstances and would not do so unless it could be shown that the liquidator had acted utterly unreasonably or, though acting in good faith took into account considerations which he ought not to have taken into account or failed to take into account considerations which he ought to have taken into account;
>
> (b) In *Re Equity Funds of Australia (in Liq)* [1976-1977] 2 ACLR 238, where His Lordship Bowen CJ applied a similar test when he held:
>
> > in my view, the test to be applied under s 279 is similar to that applying to the exercise of discretion which is committed by statute to some particular official. The principles applied by the court in such cases are reasonably well settled.
> >
> > The court will recognise that discretion has been vested by the statute in the liquidator and will not interfere unless it is shown that he did not address himself to the correct question or that he made errors of law or that he failed to take into account relevant matters or that he took into account irrelevant matters, to which may be added that if his decision in the circumstances appears such that no reasonable man could arrive at it, the court will interfere ...
>
> *Basically, the court should be slow to interfere with any act or decision of the liquidator in discharging their roles in company's liquidation particularly in matters involving sale of company's assets which involve commercial considerations. The court can only interfere in very exceptional circumstances when the liquidator has acted utterly unreasonably*. (emphasis added)

[76] I agree with Mr SP Veloo that from the cases cited, the courts have been consistent in not interfering with the decision of the Liquidator to dispose of assets of a company in liquidation and that it will only interfere if it can be shown that:

(i) The liquidator had acted fraudulently; or

(ii) That the liquidator had in some way not exercised his discretion *bona fide*; or

(iii) That the liquidator has done and/or proposing to do something which was so utterly unreasonable and absurd that no reasonable man would do it.

[77] Support is drawn from the case of *Harold M Pitman & Co v. Top Business Systems (Nottingham) Ltd* [1984] BCLC 593. At pp. 596 to 597 Nourse J states as follows:

> Counsel for the defendant (Mr. de Lacy) submits that the Statement of Claim is demurrable and ought to be struck out for either or both of two reasons. First, he submits that before the Court could have made any order restraining a sale proposed to which I have referred it would have been necessary to show either that the liquidator was acting fraudulently or that he had in some way not exercised his discretion bona fide or that he was proposing to do something which was so utterly unreasonable and absurd that no reasonable man would do it. He based that formulation of the appropriate test on the decision of Plowman J in *Leon v. York-OMatic Ltd* [1966] 1 WLR 1450.
>
> ... Counsel for the defendant (Mr. de Lacy) submitted that there is no allegation in the Statement of Claim which gets anywhere near setting up a case which falls into any of those three categories.
>
> At p 597:
>
> > I wish to make clear that I do not think it right, either on authority or in principle, that a creditor should be able to invoke the assistance of the court in restraining a proposed act on the part of a liquidator unless he can come up to the test stated by Plowman J. It would be not, for example be enough for him merely to establish negligence on the part of the liquidator.
> >
> > Even if I were wrong in that view, I am bound to say that I do not think that the Statement of Claim, in particular para 6, can be said to contain an allegation of negligence. It may well be right that in most cases for a liquidator to sell an asset of the company without a proper valuation would amount to negligence, but I do not think that that is something which can be laid down as a general rule. It seems to me that a simple allegation that there was a sale without a proper valuation, or that there would have been negligence without such a valuation, is not enough. Certainly, as I say, it does not seem to me that para 6 contains an allegation of negligence. Far less does it contain an allegation which falls into any of the three more serious categories identified by Plowman J.

A

> In all the circumstances, Mr. de Lacy is entitled to succeed on his first point. In arriving at that conclusion I pay due attention to Mr Spalding's salutary reminder that it is the practice of this Court only to strike out a statement of claim on this ground if it is clear that the plaintiff has no case.

B **[78]** Likewise in the case of *Leon v. York-O-Matic Ltd* [1966] 3 All ER 277 at p. 280 Plowman J says:

> Here, as I have said, there is no question of fraud, and, having considered all the evidence, which is fairly voluminous and lengthy, I am not satisfied that the liquidator here did not exercise his discretion *bona fide*; nor am
C I satisfied that he acted in a way in which no reasonable liquidator could have acted.

[79] This court takes into consideration the following conduct of the OR as Liquidator in disposing of the said land as highlighted by learned counsel for the Bank:

D (i) The OR did not merely consent to the said Order but also insisted that the said land must not be sold at a price below market value. This can be seen from the said Order (see exh. RG3 affidavit in reply ('AIR')).

(ii) To this end the OR's office had conscripted by a letter dated 27 June
E 2013 (the very next day after the said Order dated 26 June 2013) for a valuation be carried out on the land and that valuation be submitted to this end (see p. 38 exh. RG-5 AIR).

(iii) A valuation was carried out by Jabatan Penilaian dan Perkhidmatan Harta Cawangan Daerah Teluk Intan and a valuation report was
F submitted on 10 July 2013 (RG-5 AIR).

(iv) The OR only executed the Form 14A after ensuring that the said land was disposed of at a value higher than the value stipulated in the valuation report.

G (v) Jabatan Penilaian dan Perkhidmatan Harta had valued the said land at RM1 million. The said land was sold to the purchaser Symphony for RM1.2 million. This can be seen from the Form 14A executed by the OR (see pg. 36 Exhibit RG-5 AIR).

[80] Thus what the Liquidator has done is nothing unusual in the discharge
H of its duties to wrap up the liquidation:

(i) the Liquidator who was appointed by this Court takes control of the Respondent Company pursuant to the winding up order;

(ii) the Liquidator is tasked with statutory duties and responsibilities to wind up the Respondent Company and dissolve it; and
I

(iii) in doing so the Liquidator would have to realise its assets to obtain proceeds to repay its creditors. The sale of the said land was therefore pursuant to such duties and responsibilities.

[81] In the overall circumstance of this case, I have no good reason to set aside the decision of the OR as Liquidator to sell the land of the respondent company in liquidation.

Whether The Sale By The Liquidator Should Be Set Aside On Ground That The Contributory Could Find A Purchaser For A Better Price

[82] All that we have by way of affidavit evidence is an affidavit by the nephew of Koh, one Koh Kim Seng exhibiting a letter dated 28 August 2013 to the Bank stating as follows:

> I wish to express my interest to purchase the above property at a price which is equivalent to RM1,100,000.00.
>
> I have been made to understand that as at July 2013 the Property had been valued at RM1.000,000.00 (*sic*) by JPPH (Jabatan Penilaian dan Perkhidmatan Harta) under instruction if Jabatan Insolvensi Malaysia-Ipoh Branch.
>
> Kindly provide us "First Right of Refusal" as Mr Koh Huat Kwan who was the director of Poh Mah Housing Development Sdn Bhd is my uncle. We would like to purchase and continue the project as planned. We reside in Teluk Intan as it is our hometown.
>
> I would be grateful if you could consider my intention and hope to hear a favourable response from you as soon as possible.

[83] Then there was a letter from Koh in exh. "KH 5" dated 21 October 2013 to the Bank where Koh stated that he had heard that the Insolvency Office in Ipoh was going to sell the land for RM1.2 million and that he had a buyer for a higher sum of RM1.4 million. He objected to the sale at RM1.2 million. However there was no firm offer to purchase from the so-called interested buyer whether in writing or by payment of an earnest deposit.

[84] The Bank by its letter dated 11 November 2013 (also part of exh. "KH 5") replied as follows:

> We regret to inform you that the Bank is unable to accommodate your revised offer to purchase the above property as the Bank has already sold the property.
>
> Kindly note that the company is in liquidation.

[85] The Bank had by its letter to the purchaser Symphony dated 1 October 2013 accepted the offer of Symphony to purchase the property at RM1.2 million subject to the terms and conditions of the said letter. The earnest deposit of 2% for RM24,000 had already been deposited with the Bank on 17 September 2013. See exh. "KH 6" in affidavit in reply of Koh in encl. 14.

[86] On 27 November 2013 the Bank signed a sale and purchase agreement with the said purchaser Symphony for RM1.2 million. As the offer to purchase had come from Koh's buyer at RM 1.4 million after the Bank had accepted the offer from Symphony at RM1.2 million, neither the Bank nor the Liquidator can be faulted for proceeding with the sale at RM1.2 million.

Earnest deposit had been paid for the purchase at RM1.2 million whereas there had been nothing in writing let alone the payment of an earnest deposit from the so-called purchaser that Koh knew of.

[87] Mr SP Veloo drew the court's attention to the Indian case of *Dr. KS Thangal v. State of Kerala* [1968] AIR 197 Kerala, where it was held at p. 198 as follows:

> In *Soundarajan v. Mahomed Ismail* 1940 AIR (Mad) 42, 43, it was held that even if a person were to make an offer, after confirmation of the sale, to purchase the property at a higher amount, the court is not bound to conduct an enquiry or set aside. This is what the court said:
>
> > The fact that the sale is subject to the confirmation of the court does not mean that the court shall refuse to accept the highest bid because at a later stage some one on second thought says that he is willing to pay more. It is only right and proper that the sale should be subject to the confirmation of the court. The condition is a safeguard against irregularity or fraud in connection with the sale and against property being sold at an inadequate price. No such consideration applies here. No complaint is made of any irregularity or fraud, and it is not suggested that the respondent's final bid was inadequate. Having exceeded the reserve price agreed upon by the parties, it could not be said to be inadequate. The respondent having made an adequate bid and having complied with all the requirements of the court and there being no irregularity he was entitled to have the sale confirmed.
>
> To the same effect are the rulings reported in *Rowthmall Neopani v. Nagarmall Madan Gopal* 1939 Indlaw MAD 27), *Brindaban Agarwala v. Official Liquidator, Saraswathi Soap and Oil Mills Ltd* 1951 Indlaw ALL 5, 77), and also in *Naoshir J. Dadabhoy v. Official Liquidator* 1959 Indlaw AP 67). In *Brindaban Agarwal*'s case 1951 Indlaw ALL 5, 77) it is observed:
>
> > We think, however, it is desirable to say that, in our opinion, when property is sold by an official liquidator subject to confirmation by the court, the subsequent offer of a higher bid should not be a ground for refusing confirmation of the sale provided the price is adequate for, otherwise, as Stodart J. pointed out in AIR 1940 Mad 179.

[88] He also referred the court to another Indian case of *Taj Clay Works Ltd v. Official Liquidator* [1960] AIR 429 Andra Pradesh, where the Court held, at p 431:

> It is evident that he put forward his offer only when he came to know that the property was going to be sold to somebody else. On analogous facts, the same conclusion was reached by a Division Bench of the Allahabad High Court consisting of Mootham and Sapru, JJ. In *Brindra Ban Agarwala Official Liquidator Saraswati Soap and Oil Mills Ltd* AIR 1952 All 113. There the learned Judges stated that when property is sold by an Official Liquidator subject to confirmation by the court, the subsequent offer of a higher bid should not be a ground for refusing confirmation of the sale provided the price is adequate.

> In this case, it is not suggested by the applicant, and in fact Mr. Narasimha Iyengar has fairly conceded that he is not suggesting that there has been any irregularity or fraud or that the price is inadequate. All that is stated now is that as the applicant is prepared to make an offer of a higher sum, the matter should be reopened and his offer should be accepted.
>
> (10) Mr. Narasimha Iyengar has not been able to place before me any decision which has taken a view contrary to the one taken by the Madras High Court in the two Bench decisions referred to above (which are binding on me) and by the Allahabad High Court in AIR 1952 All 113. For all the above reasons, the applicant is not entitled to have his offer considered or accepted.
>
> This application is therefore dismissed with costs.

[89] Taking the above factual matrix into consideration, there is no good reason to set aside the sale by the Liquidator of the land secured for RM1.2 million when that had been agreed to earlier and there was nothing firm on the offer of RM1.4 million. If at all the Liquidator and the Bank had been negligent to have so sold the land at RM1.2 million, it is for Koh to bring the relevant action for damages for negligence and not to set aside the sale by the Liquidator.

Pronouncement

[90] Basically the OR steps into the shoes of the directors who are now *functus officio* and unless it has been shown that the OR has taken extraneous and irrelevant factors into consideration, I cannot see how his decision to sell the asset of the respondent company in liquidation can be said to have been made unreasonably and so ought to be set aside. It has been argued that if the OR is exercising his powers under s. 236(2)(c) Companies Act then he does not need really need a prior court order. I think it is nothing wrong seeing the history of this application which was initially to substitute the OR as the Liquidator, for the Bank in the same application to save time and to wrap up the liquidation process, to have consented for recording before the Court that the OR would consent to the transfer of the land to a third party for a price not less than RM1 million. The land was finally sold for RM1.2 million.

[91] In the event that Koh can show that he has suffered loss as a result of such a sale, he is at liberty to sue the relevant parties for the loss he has suffered but not to prevent the valid exercise of the powers of a Liquidator to sell the land of the company in liquidation. To this day the judgment debt of RM569,595.92 owing to the Inland Revenue Department has not been paid as confirmed in the Liquidator's report.

[92] In the premise I had dismissed the application in encl. 8 by Koh with costs of RM10,000 to the Bank and RM3,000 each to the OR and the said purchaser, Symphony. For completeness the application by Symphony dated 16 June 2014 in encl. 16 was allowed.

[93] From the security for costs placed with the Bank's solicitors Messrs SP Veloo of RM50,000 together with interest, there shall be deducted the sum of RM16,000 being costs ordered by this court and the balance shall be placed in fixed deposit as security for damages to be assessed failing agreement between the parties. The balance if any after assessment of damages shall be refunded to Koh's solicitors Messrs Raj Shankar.

[94] Mr Shankar had prayed for a continuing stay of the consent order because he had instruction to appeal and if stay is not granted the appeal would be nugatory.

[95] Mr Veloo objected to the stay because that would be regurgitating the same thing and it is not an exceptional circumstance. Remedies he contended would be in the form of damages. If damages is an acceptable remedy then it cannot be a special circumstance. Ms Rathimalchador the purchaser supported the Bank's objection to the stay.

[96] After hearing the parties I had found that the contributory had not shown any special circumstance justifying the stay and the Bank is in a position to pay damages if at the end of the day the applicant Koh is successful. The main brunt of his complaint is the price at which the land was sold and not the fact that the land should not be sold at all. The nugatory consideration does not arise at all. See the decision of the Court of Appeal in *Univein Sdn Bhd v. Malaysia Building Society Bhd* [2003] 2 CLJ 514; [2003] 4 MLJ 618.

[97] The proceeds realised will still be utilised in accordance with the law and I see no prejudice that may be suffered by Koh in the circumstance of the case.

[98] The oral stay application was therefore dismissed.